81-956

No.

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IN THE

Supreme Court of the United States

JIMMY FARINA,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a mere customer of a racketeering enterprise is criminally liable under 18 U.S.C. § 1962?

2. Whether the principles of *Kotteakos v. United States,* 328 U.S. 750 (1946) are applicable to this RICO prosecution?

3. Whether FARINA was denied Due Process of Law by the Trial Court's denial of FARINA's Motions for Severance.

4. Adoption of Co-Petitioner's Arguments.

LIST OF PARTIES

Rosario Palermo
Wiliam H. Brown, a/k/a Bill
John D. Fisher
Robert D. Young
Joseph Macaluso, a/k/a Joe
Frank Scionti
Sam C. Martino
Paul Guarino
Berton B. Chase, a/k/a Bert
Rolando Gonzalez Rodriguez, a/k/a Roland Rodriguez
Joseph D. Lazzara, a/k/a Joe
Joseph C. Russello, a/k/a Joe
Amalia Morgado
United States of America

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JIMMY FARINA petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals is styled *United States v. Martino, et al.* and is reported at 648 F2d 367.

JURISDICTION

The opinion of the lower Court was filed on June 19, 1981. (App. A). The Court of Appeals stayed the issuance of the mandate on FARINA until December 10, 1981. Petitions for Rehearing and for Rehearing En Banc were

timely filed. Said petitions were denied on September 17, 1981. (App. B).

STATUTES INVOLVED

18 U.S.C. § 1341.

"§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be find not more than $1,000 or imprisoned not more than five years, or both."

18 U.S.C. § 1961.

"§ 1961. Definitions.

As used in this chapter –

(1) 'Racketeering activity' means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment), if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1343 (relating to extortion), section 1952 merce, robbery, or extorsion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 2314 and 2315 (relating to in-

terstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) 'State' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) 'person' includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) 'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;. . ."

18 U.S.C. § 1962.

"1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity of the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the ac-

tivities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section."

STATEMENT OF THE CASE

In June, 1977, a 35 Count Indictment was filed in the Middle District of Florida charging FARINA and others with conspiracy, racketeering and mail fraud. FARINA was charged in Count 1 with conspiracy to conduct and to participate directly and indirectly in the conduct of the affairs of an enterprise through a pattern of racketeering activity in violation of § 1962(d) of Title 18 of the United States Code. FARINA was also charged in Count II with unlawfully, knowingly and willfully conducting and participating directly and indirectly in the conduct of the affairs of an enterprise through a pattern of racketeering activity in violation of § 1962(c), Title 18 U.S.C. FARINA was also charged in Counts IX and X with devising and intending to devise a scheme or artifice to defraud and obtain money by means of false and fraudulent pretenses, representations and promises, from an insurance company through the use of the postal service of the United States in violation of § 1341 and § 1342 of Title 18 U.S.C. (Vol. 1 Docket No. 1)

All Defendants (23) were charged in Count I of the Indictment and all Defendants except Burton B. Chase were

charged in Count II of the Indictment. Counts III through XXXIII charged specific groups of Defendants with individual mail fraud counts.

Counts IX and X jointly charge JIMMY FARINA, Sam C. Martino, Paul Guarino and Willie Noriega. These Counts specifically allege the use of the United States Postal Service to defraud the Peninsula Fire Insurance Company by means of false and fraudulent pretenses, representations and promises on a fire insurance policy issued on or for a piece of residential property located at 2917 and 2917 1/2 20th Avenue, Tampa Florida.

On November 7, 1977 the trial began and continued until February 24, 1978 when the jury returned its verdicts. Approximately 200 witnesses were called by the United States Government in its case in chief. The testimony includes approximately 1300 pages of transcript. On December 14, 1977 the Government rested its case and each of the Defendants made Motions pursuant to Rule 29, Federal Rules of Criminal Procedure. The trial Court ruled that the Government's allegation seeking forfeiture of the proceeds of the draft allegedly received by Mr. FARINA be stricken from Count II of the Indictment. The Court ruled that the evidence presented by the Government was insufficient to show that FARINA acquired, within the meaning of the Statute, the proceeds of the draft. (Vol. 70, pg. M-170) In all other respects, the Court denied FARINA's motion for judgment of acquittal under Rule 29, Federal Rules of Criminal Procedure. (Vol. 70, pg. M-176)

FARINA was convicted on Counts I, II, IX and X. (Vol. 84, pg. Z-154) Prior to trial the Co-Defendant Willie Noriega had entered a plea of guilty on Counts IX and X as well as all other Counts charging him in the Indictment and testified for the Government. The Co-Defendant Sam

C. Martino was acquitted on Counts IX and X while the Co-Defendant Paul Guarino was convicted on Counts IX and X. Both Martino and Guarino were convicted on Counts I and II. On April 14, 1978 FARINA was sentenced to 8 years imprisonment on Count I, eight years imprisonment on Count II, five years imprisonment on Count IX and five years imprisonment on Count X, all to run concurrently with each other.

STATEMENT OF THE FACTS

Although the transcript exceeds 13,000 pages of testimony, evidence and argument, the gist of the Government's case against FARINA can be studied in detail by a close reading of 10 pages of transcript located in Volume 49, pages 52-61. Briefly, the Government, through its main witness, Willie Noriega, presented evidence that Sam Martino introduced JIMMY FARINA to Willie Noriega in January of 1974. This meeting occurred at Sam Martino's Real Estate Office in Tampa, Florida. According to Noriega's testimony (pg. 54) Martino had indicated to Noriega that he wanted to speak to Noriega and after introducing FARINA to Noriega, Martino advised that FARINA was one of his partners and that they were interested in building apartment houses and selling them. Noriega further testified that Martino was interested in a piece of property that they were trying to acquire. The "they" apparently refers to FARINA and Martino. The piece of property in question had a house located on it and Martino and FARINA wanted it burned so that insurance proceeds could satisfy the existing mortgage. Noriega further testified that "they" were interested in putting the property in Mr. Noriega's name and that insurance would be secured and that they would arrange the financing. Noriega further testified that after the burning of the property the title to the land would be transferred back to

them. Noriega testified that the reason he was chosen was that he had had nothing burned in his name and that he was someone they could trust. Noriega testified that he agreed to participate in this transaction but no further action was taken by them in respect to the discussion.

During the Conversation a discussion arose as to the subject matter regarding FARINA in Counts I, II, IX, and X of this Indictment, the property located at 2917 and 2917 1/2 20th Avenue, Tampa, Florida. According to Noriega (Vol. 49, pg. 57) FARINA wanted the property burned because it was in pretty bad condition. Noriega testified that FARINA asked him to do a favor for him and to burn the residence located on the property. According to Noriega, FARINA further explained that he had approximately $4,000.00 insurance on the property. Noriega requested $400.00 as his fee for burning the residence. Noriega further testified that FARINA did not have the money and therefore Sam Martino delivered $400.00 to Noriega and that Martino and FARINA would settle at a later date. Noriega then testified that he made plans with Paul Guarino to burn the residence and upon arriving at the location observed the property to be in very poor condition and that one side of the duplex was vacant. Noriega indicated that they (Noriega and Guarino) entered through the back entrance and with the use of a couple of containers of gas and some kindling wood ignited the fire. Noriega testified that the property earlier discussed located off the Bayshore was never acquired by Martino, FARINA and Noriega and nothing further was done regarding that property.

James Christianson testified (Vol. 54, C73-78) that he was in charge of claims with Peninsula Fire Insurance Company. Mr. Christianson testified that the policy had been issued in March, 1972 to Maria Farina and the Estate

of J.A. Farina in the amount of $4,000.00 for the property located at 2917 and 2917 1/2 20th Avenue, Tampa, Florida.

Joseph D. Shea, Jr. testified (Vol. 3 F293 pg. 21-23 & Vol. 55 D66-103) that he was employed by the Hillsborough County Minimum Housing Department during 1974 and that the duplex residence located at 2917 and 2917 1/2 20th Avenue had been cited for repairs that were needed. Mr. Shea did not testify that the property had been condemned or that it was scheduled for condemnation.

Judy Knapp testified (Vol. 61 F83-87) that she was a claim supervisor for O. H. Carter and testified that Exhibit #136 was a copy of the policy which indicates the date that the policy was issued. The insurance carrier was Peninsula Fire which issued a total amount of $4,000.00.

Roland Rodriguez testified (Vol. 67, J127-131) that he investigated a fire while working for the Tampa Fire Department at 2917 and 2917 1/2 20th Avenue, Tampa, Florida on February 25, 1974. He testified that he conducted a normal routine investigation which discovered flammable saturations near the bathroom in a plastic container found in the general vicinity. (Exhibit #240(a) & 240(b))

Sam Martino testified (Vol. 21, 99-102) that he had known and had had mutual business interests with JIMMY FARINA for many years. These business ventures related to the construction business. Mr. Martino testified that he had never held any interest in the property located at 2917 and 2917 1/2 20th Avenue, Tampa, Florida nor had he ever had any discussions with Willie Noriega regarding this property or the burning of this property. Mr. Martino also denied any knowledge or involvement in in-

surance proceeds, proofs of loss or the receipt of any money regarding the fire. Mr. Martino also denied any conversation with Noriega or FARINA regarding the burning of any property on or near Bayshore. Mr. Martino further testified that he wasn't even aware of the fact that FARINA had an interest in the property on 20th Avenue and that the property was never discussed in his presence.

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted by this Court to review the decision in *United States v. Martino,* 648 F.2d 367 (5th Cir. 1981). Each of the questions presented through this petition addresses an important Federal question which should be decided by this Court. In addition, each question has been answered by the Fifth Circuit in a manner which conflicts with the decision of this Court or the decision of another Circuit Court of Appeal. The first question addresses the interpretation and construction of the Federal RICO Statute. The second question illustrates that the substantial rights of the accused are affected through a RICO prosecution involving multi conspiracies. The third question demonstrates the violation of due process of law by the RICO-mass trial concept of prosecution.

ARGUMENT

I.

MERE CUSTOMERS OF A RACKETEERING ENTERPRISE ARE NOT CRIMINALLY LIABLE UNDER 18 U.S.C. §1962

FARINA was charged with violating 18 U.S.C. § 1962, commonly referred to as RICO. The heart of the RICO Statute, 18 U.S.C. § 1962(c) states:

> "It shall be unlawful for any person employed by or associated with *any enterprise* engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs *through a pattern of racketteering activity* . . ."
> (emphasis added)

The term "enterprise" is defined as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact, although not a legal entity." see U.S.C. § 1961 (1). Recently, this Court in *United States v. Turkette,* ____ U.S.____, 101 S.Ct. 2524 (1981) delineated the proof requirements of sustaining a conviction under RICO. This Court stated the following:

> "The government must prove both the existence of an "*enterprise*", and the "connected pattern of racketeering activity." The enterprise is an entity; for present purposes a group of persons associated together for a common purpose of engaging together in a course of conduct. The pattern of racketeering activity, is, on the other hand, a series of criminal acts as defined by

> statute. See 18 U.S.C. § 1961(1). The former is provided by evidence of an ongoing organization, and by evidence that *various associates function as a continuing unit.* The latter is proven by evidence of a requisite number of acts of racketeering committed by the participants of the enterprise. While the proof used to establish these separate elements may in particular cases coalese, proof of one does not necessarily establish the other."
> (emphasis added)

Thus, in order to establish an enterprise under *Turkette,* the government has the burden of proving that peripheral associates such as FARINA had a common purpose of associating together in order to engage in a certain course of conduct. Therefore, while the core conspirators banded together in order to profit from any and all acts of racketeering, the "dissatisfied owners" had no such intention. If anything, FARINA and the other peripheral defendants had the extremely narrow purpose of only profiting from the arson on their property. This Court in *Turkette,* supra, recognized that a RICO "enterprise" requires additional culpability which is evidenced by an "ongoing organization where the *various associates function as a continuing unit.*" What constitutes a continuing unit must be read narrowly, otherwise all customers by virtue of their status (as customers) are automatically included as part of a larger enterprise. What conduct or participation by the individual defendant is required to come within the meaning of the statute? This question has created conflict between Circuit Court decisions.

In *United States vs. Martino,* 648 F.2d 367 (5th Cir. 1981), the Fifth Circuit stated,

> "Congress decreed that by committing two of the designated predicate crimes relating to the affairs of the "enterprise", a persons participates in the enterprise and thus violates RICO. . . 18 U.S.C. § 1962 does contemplate the prosecution of those "customers" who engage in a pattern of racketeering activity in *furtherance of the affairs of the enterprise.* By definition such a person becomes more than a customer of the enterprise.

This interpretation of RICO is clearly erroneous. Under it, any one is culpable who commits a series of criminal acts as defined by statute, regardless of whether the individual defendant along with other associates functioned as a continuing unit. It is difficult to believe the Fifth Circuit intended such a broad sweep, especially in light of the mandatory forfeiture penalties for a § 1962 violation. See 18 U.S.C. § 1963(2). Instead, RICO seeks to punish those persons employed by, or associated with any enterprise engaged in interstate commerce, *"who conduct or participate in the conduct of such enterprises's affairs* through a pattern of racketeering activity. . ." See 18 U.S.C. § 1962.

It is a well recognized axiom of law that words are to be given their ordinary meaning. The word "conduct" means "to direct, manage, or command." See Webster's Dictionary (2nd Edition, 1980). As a customer, FARINA had no such power to direct or manage the enterprise's affairs. Any relationship he had with this enterprise was tenous at best, since the association existed for only one fire and on insurance claim.

In seeking to define the language, "conduct or participate in the conduct of such enterprise's affairs," the Fifth Circuit relied heavily on *United States vs. Tucker,* 638

F.2d 1292, (5th Cir. 1981). This reliance was misplaced, however, since *Tucker* and *Martino,* supra, are easily distinguished. In *Tucker,* supra, the Fifth Circuit held that a waitress employed by a gambling enterprise performed functions necessary to, or helpful in, the operation of the business and could be included to meet the 5-person requirement of the statute. In the instant case, however, FARINA was not employed by the enterprise, he was merely a customer; hence, *Tucker* never truly reached the question of whether a *customer* could be culpable under § 1955, as *conducting* a gambling business. However, dicta in both *Tucker* and *United States vs. Avarello,* 592 F.2d 1339 (5th Cir. 1979) indicates that while an employee of the enterprise can be culpable if the activities performed were necessary or "helpful" to the operation, a non-employee is culpable only after performing "necessary functions to the operations of the business."

In the *United States vs. Mandel,* 591 F2d 1347 (4th Circ., 1979), the Fourth Circuit interpreted the language "conduct or participate" in the statute to require *"some involvement in the operation or management of an enterprise."* Thus, the *Mandel* rational would only reach those various defendants that have functioned as a continuing unit. This is consistent with this Court's reasoning in *Turkette,* supra. Clearly, those various associates that function as a continuing unit with a common purpose come within the meaning of the statute. On the other hand, mere customers of the enterprise's service do not meet the statutory requirements of culpability and therefore should not be subject to the provisions of the RICO statute.

II.

WHETHER THE PRINCIPLES OF KOTTEAKOS V. UNITED STATES, 328 U.S. 750 (1946) APPLY TO THIS RICO PROSECUTION

The Fifth Circuit rejected FARINA's contention that the principles of *Kotteakos v. United States,* 328 U.S. 750 (1946) were violated and cited the following:

> "In *L'Hoste* we resolved this issue adverse to the appellants, stating: "If the Government proves multiple conspiracies and a defendant's involvement in at least one of them, then clearly there is no variance affecting that defendant's substantial rights." 609 F.2d at 801, citing *United States v. Wayman,* 510 F.2d 1020 (5th Cir.), cert. Denied, 423 U.S. 846, 96 S.Ct. 84, 46 L.Ed. 2d 67 (1975) . . ."

This was clearly erroneous and a misapplication of the principles of *Kotteakos,* supra. *Martino,* supra, and *Kotteakos,* supra, are factually indistinguishable. In both cases the Government proved numerous unrelated transactions. This Court in *Kotteakos,* supra, rule that such a procedure could not be considered harmless.

In *Kotteakos v. United States,* supra, this Court held that proof of multiple conspiracies under an indictment alleging a single conspiracy constituted a material variance which required reversal of any defendant whose *substantial rights were affected* thereby. This Court stated that the Government could not prove one overall conspiracy by showing that there were eight smaller conspiracies. The Fifth Circuit in *United States v. Elliott,* 571 F.2d 880 (5th Cir. 1978), rehearing denied 575 F.2d 300, stated that the RICO Statute helps to eliminate the variance problem by creating a substantive offense which ties together diverse parties and crimes. However, the Court was quick to caution that. . .

> "We cannot say, however, that this section of the Statute demands inferences that cannot reasonably be drawn from circumstancial evidence or that it otherwise offends the rule that guilt be individual and personal."

In *Martino,* supra, the Court disregarded the test of whether "substantial rights were affected" and adopted an erroneous theory of "proof of one conspiracy precludes a variance affecting that defendant's substantial rights." This Court must correct this error and emphasize that even in RICO prosecutions this Court will demand that the proof conform to the allegations of the indictment and that if a variance exists that the Court will be required to examine the underlying facts to determine if the defendant's substantial rights have been affected. Accordingly, the RICO Statute does not authorize that individuals "be tried en masse for the conglomeration of distinct and separate offenses committed by others." *Kotteakos v. United States,* supra.

III.

WHETHER FARINA WAS DENIED DUE PROCESS OF LAW BY THE TRIAL COURT'S DENIAL OF FARINA'S MOTIONS FOR SEVERANCE

FARINA was a victim of the RICO-mass trial concept of prosecution. In *Martino,* supra, at pg. 8248-49 the Fifth Circuit summarized the atmosphere of the trial and stated that the trial judge faced a formidable task. FARINA agrees with the Lower Court that the Trial Judge conducted the trial "with every tool at his command." However, regretfully, FARINA strongly contends that the task was too great for one judge or one trial. Clearly, the facts of this case demand multiple, separate prosecutions. The spill-over and transference of guilt was pervasive and

incapable of being controlled by cautionary instructions form the Trial Court.

This Court in *Kotteakos v. United States,* supra, stated the following:

> "Numbers are vitally important in trial, especially in criminal matters. Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application."

In *Martino,* supra, the Court concluded that there was no abuse of discretion in the failing to grant a severance in that the "jury meticulously sifted the evidence". The Court erroneously concluded that 3 weeks of deliberation by the jury confirmed that fact. However, the opposite appears to have occurred as it pertains to the one fire involving FARINA. As set forth in the statement of the facts, FARINA, Martino, Guarino and Noriega were charged in Counts IX and X, which were the predicate offenses to FARINA's involvement in Counts I and II. The testimony regarding FARINA was limited to one conversation between FARINA, Martino and Noriega. Martino denied that the conversation took place. There was no testimony that FARINA knew or had any involvement with Guarino. The testimony in the light most favorable to the Government shows that Martino assisted in the planning of the arson and that Guarino assisted in the perpetration of the arson. Neither Martino or Guarino assisted in the preparation of the mailing of the proof of loss or the receipt of the draft. In spite of these facts and contrary to the Lower Court's conclusion that the jury "meticulously sifted the evidence", the jury convicted FARINA and Guarino of Counts IX and X (Mail Fraud) and acquitted Martino of Counts IX and X.

This was not merely a mass trial, but also a trial of mass confusion. As this Court concluded in *Kotteakos,* supra, "error permeated the entire charge, indeed the entire trial."

IV. ADOPTION OF CO-PETITIONER'S ARGUMENTS

Petitioner FARINA has reason to believe that co-petitioners as set forth on the list of parties will be filling various additional arguments to support this Court's review of *Martino,* supra. FARINA specifically adopts those issues and arguments that benefit the Petitioner FARINA.

CONCLUSION

Based upon the foregoing arguments and authorities, FARINA respectfully requests an order granting the petition for writ of certiorari so that this Court may answer the important questions set out above and eliminate the conflict in decisions.

Respectfully submitted,

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